In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No.

GILBERT E. THIEL,
Petitioner,
vs.
SOUTHERN PACIFIC COMPANY (a corporation), et al.,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. OPINION OF THE COURT BELOW.

The Circuit Court's opinion is reported in ..... F. (2d) ..... and appears at pages 110 to 117 of the Record. The District Court's order with its citations denying the second motions to amend and remand appears on page 61 of the Record.

II. JURISDICTION OF THIS COURT.

A full statement of the jurisdiction of this Court appears on page 11 supra, and for brevity is not repeated here.

III. STATEMENT OF THE CASE.

A full statement of the case appears supra commencing on page 2, and for brevity is not repeated here.

IV. SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred in affirming said decree of injunction thus holding that the District Court had jurisdiction and thus depriving plaintiff of his valuable right to proceed with his case in the State Court, and more particularly erred as follows:

1. The Circuit Court erred in holding that, on motion to remand, it could not be reasonably understood or inferred from the original complaint that said "conductor" and "police officer" were being sued as joint defendants or at least so intended by plaintiff.

2. The Court erred, on motion to remand, in closing its eyes to the uncontradicted evidence *in the record* AT THE TIME OF MOTION TO REMAND showing plaintiff's clear intent from the beginning to make said "conductor" and "officer" joint defendants. It looked only at the original complaint

and petition for removal and completely ignored plaintiff's answer to the petition for removal, his plea to the jurisdiction, defendant's answer to the complaint and its answers to interrogatories.

3. The Court erred in holding that *Pullman v. Jenkins,* supra, does not permit it, after removal, to consider any newly discovered or other evidence or permit appropriate amendment affecting jurisdiction even though the evidence clearly shows there was no diversity of citizenship from the beginning.

4. The Circuit Court's unfair remarks and hostile attitude towards plaintiff during the oral argument, simply because he desired to exercise his legal right to proceed with his case in the State Court rather than in the Federal Court deprived plaintiff of a fair hearing of his appeal before an impartial and unbiased Court.

V. ARGUMENT.

1. ATTEMPT TO STATE A CAUSE OF ACTION AGAINST "CONDUCTOR", "OFFICER" AND "DOES".

Surely, if the complaint does not technically state a cause of action against the "conductor", because the technical words "First Doe" or "defendant" were not immediately attached, a reasonably *liberal* construction shows at least that *some attempt* was made to do so by charging that he "saw plaintiff hanging from said window but negligently and carelessly failed to give the stop signal until after plaintiff had fallen to the ground". (R. 11.) In a suit

of this kind, is there anything unusual about naming a conductor and other agents of a railroad company as "Doe" defendants when plaintiff does not know their names and addresses?

Paragraph VI of said complaint (R. 11) actually does state a cause of action against said "Doe" defendants as it charges *all* defendants with definite joint negligent acts. Said cause of action may have been "imperfectly stated" but even by a strict interpretation it *cannot be denied* that at least *some attempt* was made to state a cause against them. Said paragraph is definitely not "meaningless", as the Circuit Court says, under any liberal interpretation of plaintiff's intent as surely there is some room for honest minds to differ about same.

Cella v. Brown, 8 Cir., 144 F. 742, and similar cases do not apply here firstly, because the facts differ and secondly, because plaintiff here has at least attempted to state a cause of action against the "conductor" as a "Doe" defendant who is not a mere *formal* party but a proper and necessary party who *cannot* be disregarded in the petition for removal even though he has *not been served* with summons and his *residence is not set forth.*

Pullman v. Jenkins, 305 U.S. 534, 540;
Grosso v. Butte Electric Ry. Co., 217 F. 422;
Jensen v. Safeway Stores, 24 F. Supp. 585;
Bagenas v. Southern Pacific Co., 180 F. 887, 889:

"It is true that it is held that a defendant sued purely by a fictitious name, *without other facts*

> *identifying him* as a proper or necessary party to the cause of action stated, will be regarded as a *formal* party merely, whose presence on the record, will not affect the right to removal by one otherwise entitled thereto. * * * But in the next place he was distinctly identified by express averment as the *conductor* of the offending train, and *as such a perfect cause of action was stated against him as a joint tort-feasor* with his co-defendant. * * * One may sue any or all of those jointly liable for a tort, and it does *not* lie with a defendant so sued to question the good faith with which his co-defendants have been joined, even though such joinder may appear to be for the very purpose of preventing a removal of the cause. (Citing.)"

The mere joinder of a resident agent of a defendant railroad company as a defendant does not constitute fraud.

Chesapeake & Ohio Ry. Co. v. Cockrell, 232 U.S. 146, 152, 58 L. Ed. 544;

Martin v. Norfolk & W. Ry. Co., 8 Cir., 43 F. (2d) 293, 296;

Trivette v. C. & O. Ry. Co., 6 Cir., 212 F. 641, 643.

Plaintiff's motives in exercising his legal right to join a resident agent of a railroad company as a defendant cannot be questioned. (See cases on page 9 supra.)

The cases uniformly hold that on motion to remand, the complaint is most *liberally* construed with all inferences in favor of plaintiff to permit remand. (See cases on page 13 supra.)

In making a most strict and technical interpretation of said complaint, it is respectfully submitted that the Circuit Court is in conflict with the decisions above referred to.

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2. TRUE FACTS IN RECORD COMPLETELY IGNORED.

Plaintiff's plea to the jurisdiction (R. 57) and his answer to the petition for removal (R. 54) created issues of fact to be tried *only* in the Federal Court. Plaintiff's said plea and answer clearly showed plaintiff's intent from the beginning to join the "conductor" and "officer" as defendants and also showed plaintiff's efforts to get information about them even from defendant Company which refused same at a time when plaintiff could have amended without leave of Court. (R. 58, 59, 2.) The burden of proof was upon defendant Company as petitioner to refute plaintiff's allegations but it offered none because plaintiff stated nothing but the truth. (See cases on pages 14, 15, supra.)

Good v. Hartford Acc. Co., 39 F. Supp. 475, 477 (June 1941), clearly covers the law applicable here:

> "If a removal is effected, the plaintiff may, by a motion to remand, plea, answer or traverse, take issue with the statements in the petition. If he does, the issues so arising must be determined by the District Court, and at the hearing the petitioning defendant must take and carry the burden of proof. Wilson v. Republic Iron & Steel Co., 257 U.S. 92."

Defendant Company's petition for removal easily recognized plaintiff's intent to charge "negligence of petitioner *and its agents,* as appears from the *complaint* herein". (R. 17.)

Defendant Company's answer had no difficulty whatever in identifying the specific "conductor" and "officer" from said complaint and admitted some of their acts as charged. (R. 30.)

Defendant Company's answer to plaintiff's interrogatories (R. 91-96) plainly show that the connection of said "conductor" and "officer" with the controversy here is real and they are not merely "formal" parties. They are *indispensable* and cannot be ignored and disregarded.

Both motions to remand were *specifically* based on all the above pleadings and papers, including said answers to interrogatories. (R. 37, 50.)

It is submitted that in closing its eyes to all this evidence *in the record* AT THE TIME OF MOTION TO REMAND, showing the true facts, the Circuit Court is in conflict with the above cases.

(a) Furthermore, in totally ignoring this strongly urged point, the Circuit Court has denied plaintiff "due process" as he was entitled to at least have the point considered and mentioned in the opinion which is adverse to him.

3. AMENDMENT IS ALLOWED AFTER REMOVAL AND REMAND IS THEN ORDERED.

It is respectfully submitted that the Circuit Court has definitely misunderstood and misapplied here the rule of *Pullman v. Jenkins,* supra. The facts of that case simply do not apply here as there were no plea, answer to the petition, answer to interrogatories or any matter of *evidence* before this Court. The only question was whether an amended complaint filed after the petition for removal could be considered in determining *"the right of removal"* to the Federal Court. Obviously, it could not. This rule was already well established and was based on the cited cases. The Supreme Court was merely considering the motion to remand as a *demurrer* to the petition for removal as is stated in *Farmers Bank v. Atchison, T. & S. F. Ry.,* 8 Cir., 25 F. (2d) 23, 27, and *Leonard v. St. Joseph,* 8 Cir., 75 F. (2d) 390, 395. It was *not* confronted with any *issues of fact* on said petition or any *later discovered* evidence in the Federal Court showing an intent and attempt to name a "Doe" defendant and discovery of no proper diversity of citizenship.

The *Pullman* case does *not* hold that evidence *first discovered in the Federal Court after removal* cannot be considered or amendment allowed on *motion to remand.* It does *not* hold that when plaintiff files an answer to the petition for removal that the District Court cannot consider evidence or allow amendment in determining a *motion to remand.*

While a removal may be entirely proper *at the time* the petition is filed, subsequent discovery of evidence

and other matters *then in the record* and before the Court may permit amendment and compel a remand *"at any time"*.

(a) *Solanics v. Republic Steel,* 34 F. Supp. 951, 953 (1940), discusses said *Pullman* case and says:

> "It seems to this court that the language of the Supreme Court to the effect that federal jurisdiction will not be affected by amendment of pleadings after removal, must be restricted to the specific facts of the cases in which such language was used."

Also, *Polito v. Molasky,* 8 Cir., 123 F. (2d) 258, 261 (Nov. 1941), mentions said *Pullman* case and it would permit amendment, after removal, when it *then* appears that there is no diversity and, when the evidence is sufficient, it would order remand.

Similarly, when, after removal, there ceases to be a separable controversy by reason of amendment of the pleadings so that there is *then* no diversity, remand to the State Court is proper.

Highway Const. Co. v. McClelland, 8 Cir., 15 F. (2d) 187, 188 (Cert. denied in 273 U.S. 765);

St. Paul v. Cab Co., 303 U.S. 283, 295.

(b) The following cases hold that where the citizenship of a party showing no diversity is first discovered or raised in the District Court, amendment may be allowed and the case remanded or dismissed, and neither party may waive the question of jurisdiction by laches, consent or estoppel, and the District Court has no "discretion" to deny the amendment:

St. Louis Smelting v. Nix, 8 Cir., 272 F. 977; *Page v. Wright,* 7 Cir., 116 F. (2d) 449, 453-4 (1940).

Said *Page v. Wright* holds on page 454 that under Rule 12 (h) (2) of the new Federal Rules of Civil Procedure (1938) the defense of no "jurisdiction" which is never waived includes the objection of no "diversity of citizenship" and said rule refers to Rule 15 (b) which permits an amendment to conform to evidence "at any time, even after judgment".

(c) The Circuit Court has nullified 28 U.S.C.A. Sec. 80, which requires the Federal Court of its own motion and "at any time" to order remand when facts showing no jurisdiction are presented. Its decision here forever ties the District Court's hands on all motions to remand so that it can never look into the true facts between the parties but must look only to the original complaint and the petition for removal.

(d) When a petition for removal is filed, plaintiff can no longer amend his complaint in the State Court. His hands are tied by the *rules of procedure* until the transfer to the Federal Court is completed, as the cases cited above indicate. However, he should not, thereby, be deprived of his *ordinary rights* to make any *reasonable amendments* to his complaint. If the petition for removal had not been filed, plaintiff could, at that time, and as a *matter of course,* amend his complaint, setting forth the true names, if known, of said "conductor" and "officer" as joint defendants. Does it not then seem strange that the mere filing of

said petition should here deprive him of such right and actually cause an involuntary *dismissal* against said agents?

The new Federal Rules of Civil Procedure, Rule 15 (a) and (c) thereof, freely permit amendments and they relate back to prevent the bar of the statute of limitations when they arose out of the occurrence "*attempted* to be set forth in the original pleading".

It is the well established rule of the California Courts that amendments be allowed with "great liberality" and where a "bona fide attempt" is made to state a cause of action against a party but which fails because of "some imperfections", it may be remedied by amendment which relates back to avoid the statute of limitations, as is stated clearly in *Day v. Western Loan,* 42 Cal. App. (2d) 226, 108 Pac. (2d) 702 (Hearing denied by California Supreme Court in 1941). Said case most liberally interprets Code of Civil Procedure Section 474, which allows a defendant whose name is unknown, to be sued by "any name", with subsequent amendment.

Furthermore, the alleged bar of the statute is a personal defense which may be raised or waived only by said agents and not by defendant Company. 16 *Calif. Juris.* 412, Sec. 23.

In view of the above, it is submitted that the California cases cited by the District Court (R. 61) are definitely not in point here.

4. BIAS OF CIRCUIT COURT.

The statements and conduct previously set forth showing the bias of the Circuit Court need not be repeated here. It is submitted that they urgently call for supervision by this Supreme Court and a review should be granted, if plaintiff's appeal is to receive a fair hearing by an unprejudiced Court.

CONCLUSION.

Under the peculiar circumstances presented here, it would seem apparent that plaintiff is entitled to at least some equitable relief to prevent him from being deprived of his valuable right to proceed in the State Court. He is most sadly crippled for life and the issue here is of such *extreme importance* to him that he has been forced to come to this Supreme Court as the Court of last resort to protect his right.

It is submitted that strict technicalities without any consideration of the true facts before the Court should not be allowed to prevail in this day of modern justice.

Wherefore, petitioner prays that the writ of certiorari issue as prayed and that said decision be reviewed and reversed.

Dated, San Francisco, California,
April 29, 1942.

Respectfully submitted,
ALLEN SPIVOCK,
JOHN L. MURPHY,
Counsel for Petitioner.

Due service and receipt of a copy of the within is hereby admitted

this_____day of April, 1942.

_____

Counsel for Respondent.

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In the Supreme Court
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OCTOBER TERM, 1941

No. 1206

GILBERT E. THIEL,
Petitioner,
vs.
SOUTHERN PACIFIC COMPANY, a corporation,
Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

The petition fails to show a case for issuance of the writ within Rule 38 of this Court. **The only question presented is that of the construction and effect of a complaint filed in the State Court.** The question is one of State law. **The State Court** (R. 26, 27), **the District Court** (R. 49, 61, 71-82), **and the Circuit Court of Appeals** (R. 109-117) **all agreed** that no defendant was joined against whom a cause of action was stated, except Southern Pacific Company; that no cause of action was stated against any "Doe" and the complaint failed to proceed far enough to make any "Doe" a party; that there was no attempt to make anyone else a party; that no conductor or police officer or "other agent" had been sued; that as between plaintiff and Southern Pacific Company there was diversity of citizenship,

and that, accordingly, the cause was properly removed to the Federal Court.

I.

THE FACTS.

Petitioner's complaint (R. 9 *et seq.*), after the title of court, was captioned and read as follows:

> "GILBERT E. THIEL, Plaintiff, vs. SOUTHERN PACIFIC COMPANY, a corporation, FIRST DOE, SECOND DOE and THIRD DOE, Defendants.
>
> COMPLAINT FOR DAMAGES
> (Personal Injuries)
>
> "Plaintiff complains of **above**[1] defendants and alleges:
>
> I.
>
> "That plaintiff does not know the true names of **defendants sued herein as 'Does'**[2] and prays leave to insert same when ascertained."

There is no other reference to any "Does". No "Doe" is said to be an employee of Southern Pacific Company, or identified with either the plaintiff or the defendant. No "Doe" is described, either by anything he did or any position he held. **Named in the caption and in Paragraph I, Does are thereafter disregarded.**

It is alleged that Southern Pacific Company received certain information "through one of its regularly uni-

1. The only defendants complained of, the only defendants joined and sued, are those referred to "above" i.e. **in the caption.** No other persons, mentioned in the complaint, are "complained of."

2. Sued as "**Does**"; **not** sued by some other name; **not** sued as "other agent" or "special police officer" or "conductor" or "porter" or **by any other** designation **or description.**

formed special police officers,[3] and other of its agents''[4] (R. 10, 11); that **one of** ''defendant company's regular conductors **on** said train''[5] negligently failed to give a stop signal when he saw plaintiff hanging from a window.

Paragraph VI of the complaint (R. 11) alleges:

> ''That said fall was caused by the carelessness and reckless conduct of said defendants, **who, with full knowledge of plaintiff's said condition, accepted him as a passenger** and then carelessly and recklessly failed to take any reasonable precautions for his safety.''

This is the only reference to plural defendants, or to any defendant other than respondent.[6] The reference to defendants is a reference to persons sued, ''Does''. It is reference only to persons who accepted plaintiff as a passenger and who had certain knowledge. It is not alleged that any agents referred to accepted plaintiff as a passenger. It cannot refer to the conductor, because it is a reference to defendants who ''with full knowledge of plaintiff's said condition'' accepted him as a passenger. There is no allegation that any conductor had any knowledge of any condition of the plaintiff.

The ''Does'' are not characterized or identified. Offhandedly thrown into the caption and Paragraph I, they

3. The officer is not designated as a defendant or as a "Doe."

4. Not designated as defendants or "Does" or otherwise identified, although if a claim is made that a police officer or a conductor was joined the claim could equally well be made for an indefinite number of other unidentified agents of the railroad. The interrogatories fished to see what "other agents" there were (R. 94, 95) who might then be claimed to have been intended all the time in the effort to defeat removal.

5. The "Company" is called "defendant" but, *ex industria*, the conductor is not. Apparently there were several conductors on the train. (Interrogatories 67 and 68.) It is not alleged the conductor referred to was on duty or in charge of the train; he was only **one of** respondent's conductors.

6. Except in the caption and prayer.

are thereafter forgotten. They are not even identified as employees of respondent. The complaint not only shows ignorance of names, but makes no attempt to identify. Indeed, one of plaintiff's papers says their "identities" as well as their "names" were unknown. (R. 54) The complaint was insufficient to state a claim against anyone (other than Southern Pacific Company) even if sued by his true name.

At no place is a special officer or conductor called a defendant. At no place is any "Doe" said to be a conductor or police officer. At no place is a conductor or police officer said to be a "Doe". No one of the "Does" is any more identified as a conductor or police officer than as any "other of its (respondent's) agents".

The Petition for Removal unmistakably stated:

> "It is impossible to tell from said complaint, or otherwise, what individuals are referred to by said fictitious designations "First Doe, Second Doe and Third Doe", or any of them. Said complaint *does not state a cause of action against said fictitiously designated defendants*, or any of them, nor does it state a claim upon which relief can be granted against said defendants, or any of them, and in truth and in fact *no person or persons is or are made defendant or defendants herein other than Southern Pacific Company.* **No other person is mentioned in the complaint as a defendant or otherwise as a party.**"

This is **not** a case where the State Court refused to remove. The State Court made a formal order of removal

expressly finding the petition to be true. (R. 27)[7] It held that there was no other defendant than respondent.

After removal to the District Court, petitioner filed interrogatories. They were not confined to inquiries about policemen or conductors (R. 91-96), but made inquiry as to ticket sellers and other agents and employees.[8] The answers showed that the conductor in charge of the train was a California resident. From **then** on, but **only from then** on, special policemen, ticket sellers and "other agents" were forgotten. The California resident, it is **now** discovered, was—so we are told—First Doe all the time!

Two attempts were made to amend the complaint. For two reasons these are of no consequence. In the first place, leave to amend was denied. In the second place, even had leave to amend been granted, the changes made could not be considered in determining the right of removal. It was to be determined on the complaint as it read when the petition and bond for removal were served, filed and presented to the State Court.

The petition here makes some reference to claimed conduct of the District Court and the Circuit Court of Appeals. The statements can be identified readily by want of supporting reference to the record. They are not

7. The state court had authority to determine the meaning and effect of the complaint. This was a question of state law. See *Iowa C.R. Co. v. Bacon*, 236 U.S. 305, 309, 59 L. ed. 591, 593 col. 2.

The petition for certiorari says (p. 4) that the state court made its order for removal "over the formal objection of plaintiff." This is hardly accurate. (R. 24-27)

8. Inquiry was made as to the identity and residence of the special policeman, identity and residence of the conductor in charge of the train, identity of any agent who might have given the conductor information, identity and residence of a ticket seller, identity of an agent to whom a ticket seller may have reported information, and identity of other conductors (plural) or employees of respondent aboard the train. (R. 91-95)

deemed of consequence, but they are not true. We state this that there may be no claim of acquiescence by silence.

II.

LEGAL PROPOSITIONS.

A very short answer to the petition is that the "Doe" defendants are to be disregarded because they were "fictitious" in the full sense of the term. No cause of action was stated against any one of them. The special police officer, the conductor, and the other agents were not sued or made defendants. It is not the law of California, and the Federal cases and statutes do not contemplate, that a plaintiff may file an open end complaint, so far as parties are concerned, and after proper removal, ask to remand if he finds some person who had some connection with the transaction and who is a citizen and resident of the same State.

A person not sued by name is not a party unless he is so far described in the complaint that only he fits the description. Reference in a complaint which may apply to a dozen people does not make any one a party. The situation here is wholly different from that presented by a complaint which joins a party by a fictitious **name** and identifies him as a particular porter, or the conductor of a particular train, or the engineer of a particular train; so far identifies the person that it is clear from from the face of the complaint that the fictitious **name** is intended to apply to a definite person.

California permits an action against a person whose **identity** is known, but whose **name** is unknown. Such per-

son may be sued by a fictitious name. It does not permit the filing of a complaint reciting a series of fictitious names in the caption without identity of the persons intended to be sued. Unless the person sued by such name is so far identified that it is clear from the face of the complaint that a particular person, susceptible of being found by description, and who could recognize himself, was intended, no one is joined by such fictitious names.

California CCP §474;[9]

Mercantile Trust Co. v. Stockton etc. Co., 44 C.A. 558, 186 P. 1049;[10]

Union Tank etc. Co. v. Mammoth Oil Co., 134 C.A. 229, 25 P.2d 262;[11]

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9. "Suing a party by a fictitious name, when allowed. When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly."

10. Fictitious names were used, but there was no identification or description. One Nesbitt, claiming to be First Doe, appeared. His appearance was stricken on motion. The court said:

"The purpose of this section is obvious from the reading. Cases may arise and do arise *where the plaintiff has in mind a person* he deems a proper or necessary party defendant, but of whose true *name* he is ignorant. In such case, he may bring his suit, alleging the fact of his ignorance of the true *name* of the party, and designating him by any name, and when his true name is ascertained amend his pleading by inserting it therein, but it must be a genuine case of ignorance of the true *name* of the party. * * * It must be apparent that if the plaintiff has not in some way made Mr. Nesbitt a party to the action he had no right to appear therein by demurrer. He was not by name a party to the suit, and he was not served as one of those sued by a fictitious name. *It was for the plaintiff to make known in some way the real persons whom he desired as defendants, and whom he sued by fictitious name.*"

11. Doe Defendants were named, and it was stated they claimed some interest in the premises in question. After the period of limitations had expired, it was sought to hold some persons claiming they were sued by fictitious names. The court held against this. "The filing of the original complaint stopped the running of the statute only as to those who were made party defendants thereby, but the statute continued to run in favor of others until made parties to the action. We cannot say that the respondents were made party defendants by the filing of the original complaint. * * * *The mere intention of the appellant to sue the owner of the property, whoever he may be, is not sufficient.* In order to give effectiveness to allegations pertaining to fictitious defendants, *the plaintiff must designate the persons* to whom he refers by either, and properly by both, the service of summons or appropriate amendment."

Gates v. Wendling Nathan Co., 27 C.A.2d 307, 315, 81 P.2d 213 (hr.den.);[12]

Burlingame v. Justice's Court, 1 C.2d 71, 74, 33 P.2d 669;[13]

Kallen v. Serreto, 126 C.A. 548, 549, 14 P.2d 417, (hr.den.);[14]

Prendergast v. Mitchell-Silliman Co., 65 C.A. 456, 458, 224 P. 243 (hr.den.);

South v. San Benito, 40 C.A. 13, 19, 181 P. 845;

Luddington E. Co. v. L. A. Fortuna M. Co., 4 C.A. 369, 88 P. 290;

Bachman v. Cathry, 113 Cal. 498, 45 P. 418;

Yuba Co. v. North American etc. Co., 12 C.A. 223, 107 P. 139 (hr.den.).

It is equally clear that even where persons are sued by their true names, no cause of action is stated against them unless such facts are alleged as to show a duty and its breach. A mere statement that a person acted negligently or carelessly or recklessly states no cause of action.

Means v. So. Cal. Ry. Co., 144 Cal. 473, 478, 77 P. 1001;

Schmidt v. Bauer, 80 Cal. 565, 22 P. 256;

Lang v. Lilley & Thurston Co., 20 Cal.App. 264, 128 P. 1031;

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12. Another statute of limitations case. It was said that the statute was not tolled by the use of a fictitious name, where as to such "defendant" the "only allegations as to him are that the plaintiff is ignorant of the defendant's true name and, when he knows it, will amend by substituting it".

13. "In order that he be made a party to the action, it was necessary that he be sued or be intended to be sued *as disclosed by the record*, and generally that jurisdiction of his person be acquired * * *."

14. This case, and the following cases hold that under the California statute for change of venue from one county to another county, defendants not sued by their true names, not designated in the complaint by description, and not specified by the service of summons, must be disregarded. In the *Kallen Case*, the court said that "fictitious defendants who have not been brought into court are not to be regarded in consideration of a motion for a change of venue".

Dahms v. Gen. Elev. Co., 214 Cal. 733, 737, 7 P.2d 1013;

Buckley v. Gray, 110 Cal. 339, 343, 344, 22 P. 900;

Jacobson v. N.W.P.R. Co., 175 Cal. 468, 472, 166 P. 3;

Rivers v. Bradley, 53 F. 305.[15]

If an action is removable, presentation of a sufficient petition and bond works a removal without more. Removability is determined on the face of plaintiff's complaint, i.e., on the pleadings as they stand at the time of presentation of the petition. The cases are legion. We cite only a few of particular interest:

Madisonville T. Co. v. St. Bernard N. Co., 196 U. S. 239, 49 L. ed. 462;

Barney v. Latham, 102 U. S., 205, 213, 26 L. ed. 514, 517;

Salem Trust Co. v. Manufacturers' Finance Co., 264 U. S. 182, 68 L. ed. 628;

Graves v. Corbin, 132 U. S. 571, 33 L. ed. 462, 467;

Pullman Co. v. Jenkins, 305 U. S. 534, 83 L. ed. 334, 338;

King v. City of Beaumont, 296 F. 531;

Bernheim v. Louisville Pottery Co., 221 F. 273;

Probst v. Cowan, 91 F. 929;

Chicago etc. Co. v. Mining etc. Co., 29 F. 337;

Stewart v. Dunham, 115 U. S. 61, 29 L. ed. 329;

Kirby v. American Soda F. Co., 194 U. S. 141, 48 L. ed. 11;

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15. Held that "the facts showing such a duty on his part, and the breach of it, must be alleged; * * *. The bald charge that plaintiff was injured by his negligence is simply the statement of a conclusion without the fact to base it upon." Further held that the person referred to was to be disregarded on the question of removability from state to Federal court.

Cella v. Brown, 144 F. 742, 764 (CCA 8, cert. den. 202 U. S. 620, 50 L. ed. 1174);

L. & N. R. Co. v. Wangelin, 132 U. S. 599, 601, 33 L. ed. 474, 475;

St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U. S. 283, 294, 295, 82 L. ed. 845, 851, 852.

It is a necessary corollary that the Court must disregard persons against whom no cause of action is stated at the time the petition for removal is presented, including "fictitious defendants"; must disregard fictitious names where the person intended is not identified, and the name could just as well be claimed to fit one as another person. Removal cannot be defeated by a claim that some particular person was intended when nothing appears on the face of the complaint to point this out.

Burt v. Mo. P. R. Co., 294 F. 911, 915;

Peters v. Plains Petroleum Co., 43 F.2d 49 (CCA 10);

Cella v. Brown, 144 F. 742 (CCA 8), cert. den. 202 U. S. 620, 50 L. ed. 1174;

Knight v. Atl. C. L. R. Co., 73 F.2d 76 (CCA 5);

Plunkett v. Gulf Refining Co., 259 F. 968, 973;

King v. City of Beaumont, supra;

Bagenas v. S. P. Co., 180 F. 187, 191 (N. D. Cal. Van Fleet);

Gibson v. C. & O. Ry. Co., 215 F. 24, 26 (CCA 6);

Rivers v. Bradley, supra.

This case is wholly unlike *Pullman Co. v. Jenkins*, supra. That was not a case of a mere tossing in of a fictitious name, to be applied at will by the plaintiff to someone he might later select. The individual was identified. "His relation to the Pullman Company and his

negligence as its servant were fully alleged". (1) The defendant sued by a fictitious name was identified as a particular Pullman porter. No other person in the world fitted the description. (2) His relation to the Pullman Company as an employee was stated (a duty was shown). (3) He was specially charged with negligence. No one of these things was done in the case at bar.

In the case at bar situation is not one of suing a given person whose name is unknown, so that he is sued by a fictitious **name**, but more properly this is an attempt to defeat removal through fictitious **persons.**

The attempted amendments are false quantities. They were not allowed. Secondly, removability is to be determined by the pleadings as they stand at the time the petition is presented.

See in addition to the cases above, the following:

Pullman Co. v. Jenkins, supra;
Stewart v. Dunham, 115 U. S. 61, 29 L. ed. 329;
Phelps v. Oaks, 117 U. S. 236, 29 L. ed. 888;
Hardenbergh v. Ray, 151 U. S. 112, 38 L. ed. 93;
Puerto Rico v. Remos, 232 U. S. 627, 58 L. ed. 763, 765;
Dunn v. Clarke, 8 Pet. 1, 8 L. ed. 845;
Clarke v. Mathewson, 12 Pet. 164, 9 L. ed. 1041.

No time need be spent on the cases cited in support of the petition. None support the proposition that this case should have been remanded. There are some few cases in which the change of condition after proper removal to the Federal Court warrants a remand. These seem to be cases in which Constitutional ground of jurisdiction of the Federal Court is wholly removed. But no large time

need be spent in distinguishing these cases. The necessary distinctions were made and the question put at rest in *St. Mercury Ind. Co. v. Red Cab Co.*, supra.[16]

CONCLUSION.

The long and short of this case is that it involves only a construction of plaintiff's complaint. The State Court and the Courts below were in accord as to this construction.

It is respectfully ~~admitted~~ submitted that the petition should be denied.

Dated, San Francisco, California,
May 13, 1942.

ARTHUR B. DUNNE,
Attorney for Respondent.

16. Whatever may be true of other amendments, amendments adding new parties after removal are to be disregarded on the question of remand. *Probst v. Cowan, supra; Pullman Co. v. Jenkins, supra; Stewart v. Dunham, supra; Phelps v. Oaks*, 117 U. S. 236, 29 L. ed. 888; *People v. Fortuna Estates*, 279 F. 500, cert. den. 257 U. S. 578, 66 L. ed. 1077. Cf. *Hardenbergh v. Ray*, 151 U. S. 112, 38 L. ed. 93; *Puerto Rico v. Remos, supra.* The *Pullman Case* would seem definitely to settle the question.